No. 83-712

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

THE STATE OF NEW JERSEY,
Petitioner,

v.

T.L.O., A JUVENILE,
Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* OF THE WASHINGTON LEGAL FOUNDATION AND BRIEF OF *AMICUS CURIAE*, THE WASHINGTON LEGAL FOUNDATION

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QUESTION PRESENTED

Whether the exclusionary rule, a procedural safeguard rather than a constitutional right, fashioned by this Court primarily to deter the conduct of law enforcement officers violating Fourth Amendment rights, should be applied to a search of a student's purse during regular school hours by a public school administrator.

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MOTION OF THE WASHINGTON LEGAL FOUNDATION TO FILE A BRIEF *AMICUS CURIAE*

The Washington Legal Foundation (WLF or Foundation) moves this Court pursuant to Rules 42 and 36 of the Supreme Court Rules for leave to file the annexed brief *amicus curiae* in the above-captioned proceeding. Counsel for both Petitioner and Respondent have neither consented nor opposed the filing of this brief. Petitioner tentatively consented by telephone conversation but written consent had not been received by movant by the time this brief was sent to the printers. Citing insufficient time, Respondent declined to consent to movant's participation as *amicus curiae.*

The Washington Legal Foundation is a non-profit, public interest law firm organized and existing under the

laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. The Foundation has more than 85,000 members and 120,000 supporters throughout the United States whose interests the Foundation represents.

WLF participates in and devotes a substantial portion of its resources to matters raising criminal justice and related constitutional issues. The Foundation has recently inaugurated a "Drug Alert" Project designed to encourage and support efforts to curb the alarming increase of illegal drug use especially by this country's youth. Among other activities, WLF provides legal assistance, guidance and educational materials to parent-teacher groups, drug rehabilitation centers and municipalities interested in curbing drug abuse which leads to wasted and destroyed lives. WLF participates in court cases which implicate the proper administration of justice in this area.

The Foundation has been allowed to appear before this Court as *amicus curiae* in many cases dealing with criminal justice issues. *See, e.g., Barefoot v. Estelle*, —— U.S. ——, 51 U.S.L.W. 5189 (July 6, 1983); *United States v. Ptasynski*, 51 U.S.L.W. 4674 (June 6, 1983); and *Eddings v. Oklahoma*, 455 U.S. 104 (1982). More specifically, WLF joined 25 State Attorneys General and appeared before this Court in *Illinois v. Gates*, 51 U.S.L.W. 4708 (June 8, 1983) arguing for a good faith exception to the exclusionary rule.

In the instant case, the Washington Legal Foundation seeks to advance the interests of its members and the general public by urging the Court to reverse the decision of the Supreme Court of New Jersey in *State in the interest of T.L.O.*, 94 N.J. 331, 463 A.2d 934 (1983). The New Jersey Supreme Court's ruling applies the exclusionary rule as fashioned by this Court in *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 252

U.S. 393 (1914), to a search of a student conducted by a public school administrator during regular school hours. In so doing, the lower court ignores the narrow and prudent limitations this Court has placed on the rule through its prior decisions and impermissibly broadens the judicially created procedural safeguard in such a way as to harm the public interest.

The Washington Legal Foundation can bring to this case a perspective not presently represented by the parties in interest which will assist this Court in obtaining full consideration of the public interest issues involved. Accordingly, the Foundation respectfully requests permission to file the annexed brief *amicus curiae*.

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

INTEREST OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

The interests of the Washington Legal Foundation in this case are set forth in the foregoing motion for leave to file a brief *amicus curiae.*

STATEMENT OF THE CASE

In the interests of judicial economy, *amicus* adopts the statement of the case provided in Petitioner's brief.

SUMMARY OF ARGUMENT

The Supreme Court of New Jersey erroneously extended the application of the exclusionary rule, a procedural safeguard fashioned by this Court, *Mapp v. Ohio,*

367 U.S. 643 (1961); *Weeks v. United States*, 252 U.S. 383 (1914), to searches of students conducted by public school officials during regular school hours. The rule's application in this context is beyond the scope of the rule's remedial objectives, i.e., deterring police conduct, and harmful to the public interest in maintaining a drug-free learning environment in this nation's public schools.

ARGUMENT

I. THE APPLICATION OF THE EXCLUSIONARY RULE TO A SEARCH CONDUCTED BY A PUBLIC SCHOOL ADMINISTRATOR IS BEYOND THE SCOPE OF THE RULE'S REMEDIAL OBJECTIVES AND HARMFUL TO THE PUBLIC INTEREST.

In the landmark case of *Mapp v. Ohio*, 367 U.S. 643 (1961), this Court applied to the states a rule requiring the exclusion at a criminal trial of evidence obtained in violation of the Fourth Amendment principally upon the belief that the exclusion would deter future unlawful police conduct. In more recent decisions, this Court has reiterated that the primary justification for the exclusionary rule is the deterrence of conduct by law enforcement officers that violates a Fourth Amendment right. *Stone v. Powell*, 428 U.S. 465 (1976); *United States v. Janis*, 428 U.S. 433, 446 (1976); *United States v. Calandra*, 414 U.S. 338, 347-348 (1974). In these decisions, this Court has taken pains to point out that the rule is *not* a constitutional right, but rather a "remedial device", the application of which must be restricted to those areas where its objective, *i.e.*, deterring the unconstitutional activity of law enforcement officers, is most efficaciously served.

To paraphrase a seminal article quoted favorably by this Court in *Stone v. Powell*, *amicus curiae* submits that granted, while so many criminals must go free in order to deter the constables from blundering, the pursuance of this policy beyond necessity inflicts gratuitous harm on

society. 428 U.S. at 487 (quoting Amsterdam, *Search, Seizure and Section 2225: A Comment*, 112 U. Pa. L. Rev. 378, 388-389 (1964)). The Supreme Court of New Jersey, by applying the rule to searches by public school administrators, recklessly ignored this Court's narrow application of the rule and harmed the public interest in maintaining a drug-free learning environment in our public schools.

A. The Application of the Rule Should be Narrowly Restricted to the Illegal Activity of Law Enforcement Officers.

This Court has stated and emphasized that the principal, if not sole, justification for the exclusionary rule is the deterrence of *police conduct* that violates a Fourth Amendment right. 428 U.S. at 486. In the historic *Mapp* decision, this Court characterized the rule as a "deterrent safeguard" against unlawful seizures by *law enforcement officers*. 367 U.S. at 648. Since *Mapp*, this Court has applied the rule exclusively to searches conducted by law enforcement officers.

In the instant case, the New Jersey Supreme Court has extended the rule to allow the criminal to go free "because the teacher has blundered." Yet this Court has never ruled that the Constitution demands the exclusion of evidence acquired through a search by a public school administrator completely devoid of any police involvement. The rule was designed to be applied to and designed to deter activity like the warrantless search by police officers in the *Mapp* case. Refusing to tolerate these "shortcut methods in law enforcement" was the motive of this Court in fashioning the rule. This Court saw the application of the rule in this context as correct not only because of the constitutional imperative but because the rule made good sense. 367 U.S. at 657.

The application of the exclusionary rule to school administrators, however, makes little sense whatsoever.

Public school officials have no connection with law enforcement. Their objectives are not to arrest and bring to trial persons who have broken the law, but to enforce school rules and regulations to promote a healthy and safe environment of learning. The objective of the assistant vice-principal in the present case was not to secure an arrest, but to enforce the school rules regulating cigarette smoking. By necessity, this interest in fostering a healthy educational environment sometimes entails regulating activity that is criminal in nature, *e.g.*, vandalism, assaults on teachers and students and the like. Be that as it may, it was never the intent of this Court to apply the exclusionary rule to persons other than law enforcement officers, and this Court should reject Respondent's suggestion to do so.

In his famous dissent, Chief Justice Burger in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), stated:

> Freeing either a tiger or a mouse in a schoolroom is an illegal act, but no rational person would suggest that these two acts should be punished in the same way. . . . I submit that society has at least as much right to expect rationally graded responses from judges in place of the universal "capital punishment" we inflict on all evidence when police error is shown in its acquisition.

Id. at 419. The Supreme Court of New Jersey let a "tiger loose in the schoolroom" by inflicting "capital punishment" on the courtroom use of illegal drugs found by a school administrator. *Amicus* contends that society has the right to expect that the exclusionary rule, a deadly procedural bar to the conviction of admittedly guilty individuals, will be *narrowly* tailored by the courts to apply only when the *Mapp* goals, are furthered, i.e., deterring dishonest and unconstitutional methods of law enforcement.

B. The Potential Benefit of Applying the Rule to School Searches is Outweighed by the Potential Harm to the Public Schools and the Public Interest.

In *Stone v. Powell*, this Court emphasized that the policies behind the exclusionary rule are not absolute, but must instead be evaluated in light of competing policies. 428 U.S. at 488. Courts should employ a pragmatic analysis of the exclusionary rule's usefulness in a particular context and ask whether the benefits of applying the rule outweigh the costs society must bear by requiring the evidence to be excluded.

Therefore, the issue in the instant case is not whether students are entitled to the minimum protections of the Constitution or whether the Fourteenth Amendment as now applied to the states protects students against unconstitutional actions by public school administrators.[1] Rather, the issue is whether the potential benefits of extending the application of the exclusionary rule to regulatory conduct by public school administrators outweigh the potential injury to the role and functions of public school administrators and society in general.

In *Stone*, this Court examined the issue of whether state prisoners may invoke an exclusionary rule claim after fair and final consideration of the claim at the state level on Federal habeas corpus review. This Court declined to apply the rule in this instance since it believed that law enforcement officers would not be deterred from committing Fourth Amendment violations out of fear that Federal habeas review might reveal flaws in a search or seizure that went undetected at trial and on appeal.

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[1] Respondent's reliance on *Tinker v. Des Moines, etc. School District*, 393 U.S. 503 (1969), is misplaced in the present context. *Amicus* acknowledges that students are "persons" under our Constitution and are possessed of fundamental rights which the state must respect. *Id.* at 509. This is not the issue in the present case. The issue is whether, using a pragmatic analysis, the application of the exclusionary rule to school searches is useful.

Id. at 493. Any incremental deterrent effect that would be produced by allowing this kind of collateral review would be outweighed by the acknowledged costs to other values vital to a rational system of criminal justice. *Id.* at 494.

Similarly, the same practice of limiting the application of the rule in situations where the costs to society far outweigh any incremental deterrent effect produced by the application of the rule can be found in this Court's standing cases. For example, in *Rakas v. Illinois*, 439 U.S. 128, 134 (1978), this Court refused to apply the exclusionary rule to the benefit of defendants whose Fourth Amendment rights had not been violated. *See also United States v. Payner*, 447 U.S. 727, 735 (1980), in which the majority of this Court refused to allow the suppression of otherwise admissible evidence which had been seized unlawfully from a third party not before this Court. This Court emphasized that the interest of deterring illegal searches would not be served by exclusion of the evidence at the "instance of a party who was not the victim of the challenged practices." *Id.*

In a similar vein, this Court has not seen fit to apply the exclusionary rule in the context of impeachment of a defendant's testimony at trial. In *United States v. Havens*, 446 U.S. 620, 628 (1980), this Court held that the rule's interest in police deterrence was outweighed by society's interest in reaching the truth at trial, and this Court allowed the prosecution to impeach the defendant's testimony with illegally obtained evidence which was inadmissible in the government's direct case. *See also Oregon v. Hass*, 420 U.S. 714 (1975); *Harris v. New York*, 401 U.S. 222 (1971); and *Walder v. United States*, 347 U.S. 62 (1954).

Also, the exclusionary rule has not been applied in Federal civil proceedings even though the evidence was seized in violation of the Constitution. In *United States v. Janis*, 428 U.S. 433, 455, Justice Blackmun wrote that

there was no justification for extending the exclusionary rule to a Federal civil proceeding based upon evidence unlawfully seized by a law enforcement officer who had acted in good faith:

> In short, we conclude that exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion. This Court, therefore, is not justified in so extending the exclusionary rule. (Footnote omitted.)

Similarly, the rule has not been applied to grand jury proceedings. *United States v. Calandra*, 414 U.S. 338. The Court noted that any possible "minimal advance in the deterrence of police misconduct" was outweighed by society's interest in not hampering the role of the grand jury. *Id.* at 352.

In the instant case, the potential costs to society's interest in maintaining a safe and intellectually stimulating public school system are obvious and great. The primary concern of public school administrators is, not surprisingly, the education of America's youth and the enforcement of school rules to see that this education can take place in a proper and conducive environment. The public school is not an arm of the criminal justice system and should be allowed to pursue its educative functions without being strapped by the innumerable procedural restrictions of a police investigation or a criminal trial.[2] This Court has consistently reinforced this view by emphasizing in a number of cases that judicial interposition in the operation of the public school system of this country requires particular care and restraint. *See Board of Curators of the University of Missouri v. Horo-*

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[2] This is buttressed in New Jersey by statutes giving school administrators broad authority to maintain order, safety and discipline. N.J. STAT. ANN. Section 18A-25-2 (West 1968).

witz, 435 U.S. 78 (1978); *Ingraham v. Wright*, 430 U.S. 651 (1977).

Recent statistics on the scope of the drug and alcohol problem in the public schools provide grim evidence of the problems of drug abuse school administrators face today. *Weekly Reader*, a children's magazine distributed in the public schools, surveyed over 500,000 children in 1980 on drug and alcohol use among their peers. About one-third of the students in grades 4-8 believed that drinking alcohol is "A big problem" among children their own age, and about 40 per cent said the same about drugs. In both cases the percentages rose among high school students. WEEKLY READER PERIODICALS, A STUDY OF CHILDREN'S ATTITUDES AND PERCEPTIONS ABOUT DRUGS AND ALCOHOL (1980).

The National Institution on Drug Abuse's 1982 survey on student drug use, the sixth in an annual series reporting the drug use and related attitudes of high school seniors in the United States, reports that roughly two-thirds of all American young people (64%) try an illicit drug before they finish high school. Over one-third have illicitly used drugs other than marijuana. At least one in every sixteen high school seniors is actively smoking marijuana on a daily basis, and 20% have done so for at least a month at some time in their lives. About one in sixteen is drinking alcohol daily; and 41% have had five or more drinks in a row at least once in the past two weeks. Much of the activity takes place during school hours and on school premises. These alarming statistics reflect the highest levels of illicit drug use to be found in any nation in the industrialized world. L. JOHNSTON, J. BACHMAN, P. O'MALLEY, National Institute on Drug Abuse's STUDENT DRUG ABUSE ATTITUDES AND BELIEFS 14 (1982).

A report by the New Jersey Department of Education stated that between July 1, 1979 and June 30, 1981, New Jersey districts reported 21,721 incidents of violence,

vandalism, drug abuse, or some combination of the three. NEW JERSEY DEPARTMENT OF EDUCATION, FINAL REPORT ON THE STATEWIDE ASSESSMENT OF INCIDENTS OF VIOLENCE, VANDALISM AND DRUG ABUSE IN THE PUBLIC SCHOOLS 2, 4, 5 (July, 1982). The report went on to urge local school boards to:

> actively assist students and staff by assuring a safe atmosphere, free from danger and disruption and one which promotes a positive environment conducive to learning. Disruptive behavior constrains the learning process and lowers school morale at all levels. A discipline policy must hold students accountable and consequently apply remedial and preventive steps that will ensure the safety and promote the education of all pupils.

Id. at 59. This discipline policy, vital towards ensuring that students have a right to pursue their academic endeavors without exposure to dangers or overwhelming distraction, requires that school administrators have broad supervisory powers. Excluding drugs, weapons, and other incriminating evidence at a juvenile's delinquency hearing because the juvenile's teacher or vice-principal did not comply with the meticulous and ever-changing requirements of the Fourth Amendment as pronounced by appellate judges can only undermine that discipline policy needed more than ever in today's schools to ensure a healthy learning environment.

In contrast to the overwhelming and blatant costs that are potentially lurking as a result of the New Jersey Supreme Court's opinion, any incremental deterrent effect which might be achieved by extending the rule to apply to school administrators is uncertain at best. There is already considerable opinion that little deterrence of police misconduct results from the exclusion of illegally seized evidence from criminal trials.[3] It is even less

[3] Chief Justice Burger, in his dissenting opinion in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,*

plausible that any deterrence of misconduct by school administrators will result from the exclusion of illegally seized evidence at a juvenile's criminal proceeding.

The Chief Justice has acknowledged that policemen do not have the time, inclination, or training to grasp the nuances of the appellate opinions that ultimately define the procedural standards of conduct they are to follow in investigating a crime, *Bivens*, 403 U.S. at 447.[4] *Amicus* asks how possibly can teachers and school administrators, concerned primarily with the education of the Nation's youth and not with law enforcement acquire and maintain working knowledge of search and seizure procedure. School officials have little knowledge or interest in criminal proceedings and are likely not to comprehend why evidence seized by them in the course of their administrative duties is later suppressed at a juvenile criminal proceeding.

The fact that the application of the rule in this context will have little or no deterrent effect on the actions of school administrators is reinforced by the remoteness of the seizure and the criminal proceeding. School administrators are not only insulated from the actual exclusion

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403 U.S. 388, stated flatly that ". . . there is no empirical evidence to support the claim that the rule deters illegal conduct of police officers." *Id.* at 416. There is, however, some empirical evidence of non-deterrence of police "misconduct" by the exclusionary rule; see: Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives*, 2 Journal of Legal Studies 243 (1973); *see, generally*: Wilkey (Malcolm R., Judge, United States Court of Appeals for the District of Columbia Circuit), *The Exclusionary Rule: Should the Criminal Go Free Because the Constable Has Blundered?* 62 Judicature, 5, 215 (November 1978). Judge Wilkey also points out that no other nation in the free world has engrafted the exclusionary rule onto its criminal justice system; *id.* at 216.

[4] Illustrated recently in *Robbins v. California*, 453 U.S. 420 (1981) where a total of 14 judges reviewed a search, 7 finding it invalid and 7 finding it valid.

decision (as are police officers) but also from the entire criminal proceeding. The purpose of deterrence is defeated because the school administrator may never even learn the outcome of the proceeding.

Finally, criminal prosecution is wholly unrelated to the duties of a public school administrator. He or she is mainly concerned with enforcing the school rules to ensure the safety of the students and maintain a healthy educative environment. The assistant vice-principal that discovered the drugs in the purse of Respondent arguably would not have been deterred by the exclusion of the evidence in the later criminal proceeding, since his main goal in implementing the search was the enforcement of the school's no-smoking regulation. Endorsing the Supreme Court of New Jersey's reckless extension of the exclusionary rule would merely confuse school administrators and ultimately disrupt disciplinary measures needed to maintain a proper learning environment.

CONCLUSION

For all of the reasons stated above, the Washington Legal Foundation submits that the ruling of the court below must be reversed.

Respectfully submitted,

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